Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ~~79~~-623

IN THE MATTER OF THE ESTATE OF
BETTY R. EISENBERG, DECEASED:

ALVIN H. EISENBERG, CO-PERSONAL
REPRESENTATIVE OF THE ESTATE,

Appellant

~~-v-~~

JACK M. EISENBERG,
SURVIVING SPOUSE,

Appellee.

ON APPEAL FROM THE SUPREME
~~COURT OF~~ WISCONSIN

JURISDICTIONAL STATEMENT

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October, 1979

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Appellant

v

JACK M. EISENBERG,
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Appellee.

JURISDICTIONAL STATEMENT

Appellant, Alvin H. Eisenberg, appeals from the final order of the Supreme Court of Wisconsin, dated July 17, 1979, denying a petition to review the decision of the Court of Appeals of Wisconsin, dated May 31, 1979, holding that Secs. 861.05(1) and 861.33(1),

Wis. Stats., as applied in this case, are not unconstitutional as being violative of appellant's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The order of the Supreme Court of Wisconsin is not published and is reprinted in the Appendix at p. 12. The decision of the Court of Appeals of Wisconsin, reported at 90 Wis. 2d 620 (1979), is reprinted in the Appendix at pp. 1-11.

JURISDICTION

The decision and judgment of the Court of Appeals of Wisconsin, sustaining the validity of Secs. 861.05(1) and 861.33(1), was entered May 31, 1979. (App. pp. 1-11).

A petition for review was considered and denied by the Supreme Court of Wisconsin on July 17, 1979. (App. p. 12). The Supreme Court of Wisconsin considered and denied a motion for reconsideration on August 27, 1979. (App. p. 13).

A notice of appeal to this Court was duly filed in the Supreme Court of Wisconsin on September 28, 1979. (App. pp. 14-15).

This appeal is being docketed in this Court within ninety days from the denial of the petition for review.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2).

QUESTIONS PRESENTED

1. Where the right to take and dispose of property by will is a "sacred and inherent" right under the Wisconsin Constitution, as construed by the court below, does appli-

cation of Secs. 861.05(1) and 861.33(1), Wis. Stats., so as to permit the surviving spouse to elect against the will of his deceased wife, which will devised her separate estate to her child, deprived the testatrix or child of property and liberty without due process of law in violation of the Fourteenth Amendment?

2. Do Secs. 861.05(1) and 861.33(1), Wis. Stats., which apply only to married persons, violate the equal protection clause of the Fourteenth Amendment on their face or as applied to this case?

CONSTITUTIONAL PROVISION AND STATUTES

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 1, Wisconsin Constitution: Equality; Inherent rights. Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Sec. 861.05(1), Wis. Stats.:

Right to elective share; effect of election. (1) If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share consists of one-third of the net probate estate, reduced by any property given out-right to the spouse under the de-cedent's will. As used in this subsection, net probate estate means the net estate as defined in s. 851.17, including any property passing by intestate succession as well as under the will, but without deduction of the estate taxes.

Sec. 861.33(1), Wis. Stats.:

Selection of personalty by surviving spouse. (1) Subject to this section in addition to all allowances, and distributions, the surviving spouse may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse by the personal representative: a) decedent's wearing apparel and jewelry held for personal use, b) automobile, c) household furniture, furnishings and appliances, and d) other tangible personalty not used in trade, agriculture or other business not to exceed $1,000 in inventory value. The above selection may not include items specifically bequeathed except that the surviving spouse may in every case select the normal household furniture,

furnishings and appliances necessary to maintain the home; for this purpose any antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture and furnishings.

RAISING THE FEDERAL QUESTION

Appellant immediately moved in the county court to bar the application of the challenged statutes on the grounds that they "are in violation of the provisions of the Uni ed States Constitution." In its decision dated June 26, 1978, the County Court specifically rejected the federal constutitional challenge stating: "The court is of the opinion that the statutes in question violate no right granted under the Wisconsin Constitu-

tion or the United States Constitution."

The federal constitutional challenge was repeated before the Court of Appeals of Wisconsin. That Court identified four issues on appeal, including:

> "2. Do secs. 861.05 and 861.33, Stats. violate the equal protection clause of the fourteenth amendment to the United States Constitution, or the equal protection clause contained in art. I, sec. 1, of the Wisconsin Constitution?
>
> "3. Do secs. 861.05 and 861.33, Stats. violate the due process clause of the fourteenth amendment to the United States Constitution?" (App. p. 4).

The Court of Appeals of Wisconsin considered and expressly rejected these federal constitutional claims. (App. pp. 8-11).

The federal due process and equal protection challenge was repeated in appellant's Petition to Review to the Supreme Court of Wisconsin. This petition was denied.

STATEMENT OF THE CASE

Betty R. Eisenberg, decedent, and Jack M. Eisenberg, appellee, were married in 1931. By will dated February 2, 1945, decedent left her entire estate to her only child, Alvin H. Eisenberg, appellant.

Throughout the course of their marriage, both decedent and appellee followed a deliberate pattern of maintaining separate estates. Decedent's estate was accumulated solely through her own efforts in working in her father's businesses, doing bookkeeping, operating rooming houses, buying and selling real estate, and investing the profits made thereby, and receipt of an inheritance from

her mother approximately three years prior to her own death on January 5, 1977.

Appellee accumulated his present and substantial estate through wages and profits from a business whose ownership is in dispute and by the receipt of an inheritance from his mother.

During the marriage, no assets were ever held jointly. A deliberate pattern of keeping assets separate was maintained. Each spouse paid their own bills and bought their own necessities. The house in which they lived was solely owned and paid for by decedent.

The 1945 will was admitted to probate on January 20, 1977. Domiciliary letters were issued to appellant and appellee as co-personal representatives of the estate.

On June 3, 1977, appellee filed an election of surviving spouse pursuant to Sec.

861.05, Wis. Stats., and a selection of personal property by surviving spouse pursuant to Sec. 861.33, Wis. Stats.

Appellant, as co-personal representative of and attorney for the estate, filed motions to deny the election and selection by appellee on the grounds that the statutes are in violation of the federal Constitution. The Court of Appeals of Wisconsin expressly upheld the validity of the statutes as not violative of the federal constitution.

THE QUESTIONS ARE SUBSTANTIAL

As the Court of Appeals noted in its decision, the challenged statutes modify and replace the old dower and curtesy statutes. (App. p. 6). The dower statutes permitted a surviving wife to take a forced share consisting of one-third of her deceased husband's real property. Sec. 233.01, Wis. Stats.

(1969). The curtesy statute permitted the surviving husband to elect to take one-third of his deceased wife's real property which she had not disposed of by will. Sec. 233.23, Wis. Stats. (1969). The new statutes, effective as to any person dying on or after April 1, 1971, (Sec. 851.001, Wis. Stats.), gives either surviving spouse a minimum of one-third of the probate estate and, in addition, enumerated items of personal property. Secs. 861.05(1) and 861.33(1), Wis. Stats. Because the "net probate estate" is determined before deduction of estate taxes, and because the 861.33 selection is in addition to the elective share, the 861.05 elective share generally consists of one half or more of the estate, and could comprise the entire estate.

The Court of Appeals, following a long line of Wisconsin Supreme Court decisions, held that, unlike most states which consider

the right to dispose of property by will to be a purely statutory right, in Wisconsin the right to take or transfer property by will is a sacred and inherent right secured by Art. I Sec. 1, Wisconsin Constitution. (App. p.p. 6, 8, 9).

In considering the federal equal protection and due process challenge to the elective share statutes, the state court, citing Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944), held that "there is no federal constitutional right to dispose of property by will." (App. pp. 8, 9, 10, 11).

The Court of Appeals' treatment of the asserted federal rights ignored the fundamental constitutional doctrine that the United States Constitution does not create property or liberty interests but rather that such interests "stem from an independent source such as state law." Board of Regents

v. Roth, 408 U.S. 564, 577 (1972).

The Court of Appeals properly recognized that, under state law, the rights asserted are fundamental. (App. p. 9). Whether the challenged statutes deprive appellant of this fundamental state-created and state-defined right without affording due process or equal protection of law presents a substantial federal question.

Decisions such as Demorest are of no assistance to Wisconsin succession statutes where the right to take and dispose of property by will is, by state constitutional law, an inherent and fundamental right.

Demorest does stand for the valid proposition that a state court's interpretation of state law is binding upon this Court. The state court's interpretation of the federal constitutional provision is, of course, not binding on this Court. Appellant agrees with

the court of appeals' interpretation of the inherent and fundamental nature of the state-created right at issue. Appellant does not agree with the Court of Appeals' determination that federal due process and equal protection protect only rights which have an independent basis in federal law.

Demorest also expresses a federal policy of deference to the states in the area of testate and intestate succession laws. Again, Demorest does not address the unique situation where the right asserted is not a mere creature of state statute but rather an inherent fundamental right secured by the state constitution. Further, more recent decisions from this Court have recognized that states are not immune from federal constitutional scrutiny even in those areas where this Court has traditionally deferred to state law. Reed v. Reed, 404 U.S. 71

(1971), Trimble v. Gordon, 430 U.S. 762, 767, n. 12 (1977), Eskra v. Morton, 524 F. 2d 9, 12, 13 (7th Cir. 1975)(Stevens, J.). See also, Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967), and Orr v. Orr, 99 S. Ct. 1102 (1979).

Nor does Demorest reflect the more recent attitude of this Court with respect to state intrusion into matters pertaining to family life. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965), Trimble v. Gordon, 430 U.S. 752 (1977), Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), Zablocki v. Redhail, 434 U.S. 374 (1978), and Moore v. East Cleveland, 431 U.S. 494 (1977).

Appellant argued below that the challenged statutes deprive the testatrix and her child of the fundamental state-created right to dispose of and take property by will without due process guaranteed by the federal

constitution. Appellant argued below that the statutes impaired the testatrix's exercise of this fundamental right based solely upon her marital status in violation of the federal guarantee of equal protection of the laws. These assertions of federal constitutional rights were summarily disposed of with the observation that there is no independent federal constitutional right to take or dispose of property by will.

In addressing the question of the validity of the statutes under the Wisconsin equal protection clause, the court of appeals interpreted the right to take or dispose of property by will to be a fundamental right under state law requiring scrutiny under the "compelling state interest" standard. (App. p. 9). Appellant agrees with the state court's interpretation of the state-created right and that the statutes must be subjected

to strict scrutiny.

The challenged statutes burden the exercise of fundamental rights and intrude upon basic private choices of the nuclear family. Appellant submits that, under both the due process and equal protection clauses, this Court must closely examine the importance of the state interests advanced, the extent to which the statutes promote these interests, and whether they are sufficiently precise to express only those interests. Moore v. East Cleveland, 431 U.S. at 499, Carey v. Population Services International, 431 U.S. 678, 686 (1976), Eisenstadt v. Baird, 405 U.S. 438, 446, 447 (1972).

The state court identified three "compelling government interests" purportedly promoted by the statutes:

"1. They encourage the tranquility and well-being of each spouse in the marital

relationship by insuring one spouse will not be left destitute by the death of the other.

"2. They provide for a uniform and objective method for determining that a standard minimum of the property of the deceased spouse is to go to the surviving spouse.

"3. They provide a surviving husband with the same elective share rights as a wife." (App. pp. 9-10).

The state court merely recited the state interests without discussion. This is nothing more than "the mere incantation of a proper state purpose." Trimble v. Gordon, 430 U.S. at 769.

Recent studies have reached the unanimous

conclusion that, in practice, there is no need for a nonbarrable share for the surviving spouse in that the surviving spouse is almost always given more than the statutory share by will or non-testamentary devices. Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. Chi. L. Rev. 241, 255 (1963); Clark, The Recapture of Testamentary Substitutes to Preserve The Spouse's Elective Share: An Appraisal of Recent Statutory Reforms, 2 Conn. L. Rev. 513, 514 (1970); Kulzer, Property and The Family: Spousal Protection, 4 Rutgers Camden L. J. 195, 208 (1973); and Plager, The Spouse's Nonbarrable Share: A Solution In Search of a Problem, 33 U. Chi. L. Rev. 681 (1966). Even if the statutes do provide some protection against the "aberrational behavior" of the rare propertied testator or testatrix who disinherits his or her spouse (Kulzer, p.

214), the statutes are grossly overbroad. As construed by the court of appeals, the statutes apply irrespective of the survivors needs, the source of the decedent's estate, the decedent's reason for willing the property to another, or the needs of and relationship between the beneficiary and decedent.

Finally, the statutes simply do not protect the hypothetical destitute spouse and, in practice, are detrimental to the well-being of the family. Studies of such statutes conclude that they do not work. Kulzer, at 236; Chaffin, A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession, 10 Ga. L. Rev. 447, 469 (1976). There appear to be only two methods by which a spouse can prevent the survivor from automatically obtaining a substantial portion of the estate: First, by depleting the estate

by inter vivos transfers subject, however, to recapture by the survivor. See, Kulzer, at pp. 217, 219, and Sec. 861.17, Wis. Stats. Second, by divorce. Where parties are divorced inherited property is not a part of the marital estate subject to property division in Wisconsin and special consideration is given to the spouse who brought property into the marriage and contributed property to the marriage. Sec. 247.255, Wis. Stats.

The second asserted state interest is that of "simplicity" in that it provides a standard minimum of the estate to go to the survivor. This asserted interest depends upon the validity of the "protection" rationale. "Simplicity" would be attained by simply permitting either spouse to bequeath property without restriction.

The Wisconsin Probate Code does require hearings into the individual need and cir-

cumstances of surviving spouses. See, e.g., Sec. 861.31, relating to allowances to the family during administration; 861.35 permitting a special allowance for the support and education of minor children; and 861.41 exempting from claims of creditors property to be assigned to the surviving spouse. See, also, Sec. 861.17, allowing recapture of property transferred in fraud of the surviving spouse, and Sec. 247.255 relating to property division in actions affecting marriage. The simplicity of administration rationale simply cannot save these statutes. See, Trimble v. Gordon, 430 U.S. at 770, 771, 772 and Reed v. Reed, 404 U.S. at 76, 77.

The third state interest identified by the court of Appeals is that the new statutes "provide a surviving husband with the same elective share as a wife." (App. p. 10). This asserted interest was fully satisfied by

the abolition of dower and curtesy. Sec. 861.03, Wis. Stats. Further, the goal of equality would be fully met by statutes predicated upon actual need of the survivor. Finally, and incongruously, studies indicate that such statutes, despite their genderless "surviving spouse" language, are designed for the stereotypical family situation where the husband works outside the home for money and the wife does not, and that such statutes reinforce the stereotype by providing less incentive for the wife to attempt financial independence. Kulzer, at pp. 210, 211, 214.

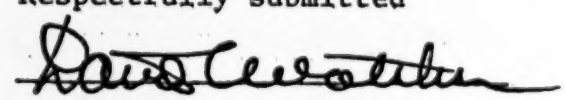
Appellant submits that the Wisconsin court erred in rejecting the federal constitutional challenge to these statutes on the sole basis that there is no independent federal right to take or dispose of property by will. Appellant further submits that because of the fundamental state-created

rights at issue and the statutes' intrusion into private family matters, plenary examination of this matter is required by this Court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted



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October 12, 1979

APPENDIX

In Matter of Estate of Eisenberg, 90 Wis. 2d 620.

IN MATTER OF ESTATE OF Betty R. EISENBERG, Deceased: Alvin H. EISENBERG, Co-Personal Representative of Estate, Appellant, v. Jack M. EISENBERG, Respondent.†

Court of Appeals

No. 78-461. Argued May 16, 1979.—Decided May 31, 1979.

1. Descent and Distribution §5°—right to take property by inheritance or will—inherent rights—governments to conserve such rights.

Right to take property, either by inheritance or will, is part of "inherent rights" which governments were created to conserve.

2. Wills §1°—right to make will—constitutional right—extent of regulation by legislature limited.

Right to make will is secured by constitution, thus, legislature can regulate succession by will or descent in intestacy within reasonable limits, but it cannot impair such rights substantially or take them away entirely.

3. Descent and Distribution §2°—election of share of deceased spouse's estate—selection of personal property—reasonable—not violative of state constitution.

Statutes which regulate right of person to dispose of property as he or she desires by allowing surviving spouse to elect share of deceased spouse's estate and to select personal property from estate were reasonable and thus did not violate pursuit of happiness clause in state constitution (Stats §§861.05, 861.33).

4. Constitutional Law §216°—right to dispose of property by will—federal right nonexistent—equal protection—statutes regulating disposition of property nonviolative.

No federal right to dispose of property by will exists under federal Constitution, thus, statutes which regulated right of person to dispose of property as he or she desired did not

† Petition to review pending.

° See Callaghan's Wisconsin Digest, same topic and section number.

violate equal protection clause of federal Constitution (Stats §§861.05, 861.33).

5. Constitutional Law §192*—equal protection—violation, determination—statutory classifications measured against rational relationship test—validity.
In determining whether statutes violate equal protection clause of state constitution, statutory classifications are measured against rational relationship test and are upheld if they are rationally related to some legitimate governmental interest.

6. Constitutional Law §192*—equal protection—statutory classification suspect—strict scrutiny—promote compelling governmental interest—narrowly drawn.
If statutory classification impinges upon fundamental right or constitutes suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests.

7. Constitutional Law §216*—surviving spouse's share of property—equal protection—narrowly drawn—not violative of state constitution.
Statutes which regulated right of person to dispose of property as he or she desired promoted compelling government interest in tranquillity and well-being of spouse in marital relationship by insuring that one spouse will not be left destitute by death of other, provided for uniform and objective method for determining that standard minimum of property of deceased spouse is to go to surviving spouse and provided surviving husband with same elective sharerights as wife, and such statutes were narrowly drawn since they only involved surviving spouse, thus, statutes did not violate equal protection clause of state constitution (Stats §§861.05, 861.33).

8. Constitutional Law §268*—right to dispose of property by will—federal right nonexistent—due process—statutes regulating disposition of property nonviolative.
Since there is no federal constitutional right to dispose of property by will, federal due process was not violated by statutes which regulated right of person to dispose of property by will as he or she desired (Stats §§861.05, 861.33).

* See Callaghan's Wisconsin Digest, same topic and section number.

9. Statutes §302*—right to dispose of property by will—applicable to one dying after April 1, 1971—will made in 1945—not retroactive or unconstitutional.
Statutes regulating right of person to dispose of property by will as he or she desired and which were applicable to anyone dying after April 1, 1971 were not unconstitutional on ground that they retroactively affected will made in 1945 since statutes only involve disposition of property of people who died after April 1, 1971 and thus was not retroactive.

10. Wills §165*—rights in beneficiary—enforceability, time—death of testator.
Will does not create any enforceable right in beneficiary of that will until testator has died.

APPEAL from an order of the circuit court for Milwaukee county: MAURICE M. SPRACKER, Reserve Judge. *Affirmed.*

For the appellant there were briefs and oral argument by *Ray T. McCann* of Milwaukee, Wisconsin.

For the respondent there were briefs and oral argument by *Jackson M. Bruce* of *Quarles & Brady*, Milwaukee, Wisconsin, with whom on the brief was *Theodore F. Zimmer* and *Paul J. Tilleman*.

Before Decker, C.J., Cannon, P.J., and Moser, J.

CANNON, P.J. The facts are simple. Betty and Jack Eisenberg were married in 1931. Betty Eisenberg executed her will in 1945, which left all of her estate to her children. She died January 5, 1977, and her will was admitted to probate on January 20, 1977. Alvin Eisenberg, the co-personal representative of the estate, is the sole surviving child of the marriage, and is the appellant in this action.

On June 3, 1977, Jack Eisenberg, the respondent, filed an election under sec. 861.05, Stats.[1] for a share of his

* See Callaghan's Wisconsin Digest, same topic and section number.

[1] Section 861.05(1), Stats. provides:
If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share

wife's estate, and a selection of personal property under sec. 861.33,[2] Stats. The appellant moved to deny the election and selection, contending that secs. 861.05 and 861.33, Stats. are unconstitutional. On August 7, 1978, the trial court denied the appellant's motion. The appellant appeals from that order. We find four issues on appeal:

1. Do secs. 861.05 and 861.33, Stats. violate the alleged right to dispose of property contained in art. I, §1 of the Wisconsin Constitution?

2. Do secs. 861.05 and 861.33, Stats. violate the equal protection clause of the fourteenth amendment to the United States Constitution, or the equal protection clause contained in art. I, §1 of the Wisconsin Constitution?

3. Do secs. 861.05 and 861.33, Stats. violate the due process clause of the fourteenth amendment to the United States Constitution?

4. Do secs. 861.05 and 861.33, Stats. violate the United States or Wisconsin Constitutions by being applicable

consists of one-third of the net probate estate, reduced by any property given outright to the spouse under the decedent's will. As used in this subsection, net probate estate means the net estate as defined in s. 851.17, including any property passing by intestate succession as well as under the will, but without deduction of the estate taxes.

[2] Section 861.33(1), Stats. provides:

Subject to this section in addition to all allowances, and distributions, the surviving spouse may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse by the personal representative: a) decedent's wearing apparel and jewelry held for personal use, b) automobile, c) household furniture, furnishings and appliances, and d) other tangible personalty not used in trade, agriculture or other business, not to exceed $1,000 in inventory value. The above selection may not include items specifically bequeathed except that the surviving spouse may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home; for this purpose any antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

to all people dying after April 1, 1971, even when their wills were created prior to April 1, 1971?

Each issue shall be answered separately.

RIGHT TO DISPOSE OF PROPERTY

The appellant first contends that secs. 861.05 and 861.33, Stats. are "unreasonable regulations of the constitutional right to dispose of property as one chooses." He concludes this makes those statutes unconstitutional.

[1, 2]

The Wisconsin Supreme Court has long held that the right to take property, either by inheritance or will, is part of the "inherent rights" which governments were created to conserve. *Nunnemacher v. State*, 129 Wis. 190, 202, 108 N.W. 627 (1906). The court has made it clear that, unlike many states which consider the right to dispose of property by will to be purely a statutory right, in Wisconsin:

> [T]he right to make a will is secured by the constitution, and . . . the legislature can regulate succession by will or descent in intestacy within reasonable limits, but it cannot impair such rights substantially or take them away entirely. *Estate of Ogg*, 262 Wis. 181, 186, 54 N.W.2d 175 (1952), quoting from 1 Page, Wills (2d ed.), p. 37, sec. 22.

At other times the supreme court has referred to this right as a "sacred right." *Will of Szperka*, 254 Wis. 153, 157, 35 N.W.2d 209 (1948). The pursuit of happiness clause in art. I, §1 of the Wisconsin Constitution[3] has been interpreted to contain this "inherent right" to dis-

[3] "Equality; Inherent rights. SECTION 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

pose of property by will. *Nunnemacher, supra* at 200, 202. However, at the same time it recognized this "inherent right," the supreme court also made it clear that "these rights are subject to reasonable regulation of the legislature." As examples of proper methods of government regulation of this right, the court listed the following:

> [L]ines of descent may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed, and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will, so that dependents may not be entirely cut off. These are all matters within the field of regulation. *Nunnemacher, supra* at 202.

Thus, the regulation contained in sec. 861.05 and 861.33, Stats, does not violate the "pursuit of happiness" clause if it is "reasonable."

Section 861.05, Stats. modifies and replaces the dower and curtesy statutes formerly contained in secs. 233.13–233.14, Stats. Although the constitutionality of the old dower and curtesy statutes were always upheld by the supreme court, the appellant contends that "[s]ociety has changed substantially in the last decade," therefore rendering the elective share contained both in sec. 861.05 and the old dower statutes an unreasonable regulation of the "inherent right" to dispose of property as one chooses.

We disagree with this contention. The fact that some men and women would not be left destitute by the death of their spouse, even if they were not provided for in the will, is certainly no argument that the legislature cannot regulate the right of a person to dispose of property. We are not aware of any societal changes in the last ten years which are so fundamental as to make secs. 861.05 and 861.33 unreasonable.

The appellant further contends that the unreasonableness of the regulation contained in secs. 861.05 and 861.33 is exemplified by comparing those statutes with the method for dividing property contained in Wisconsin divorce statutes.[4] He also mentions community property jurisdictions where inherited property, appellant contends, is excluded from a surviving spouse's elective rights.

[3]

We agree that the Wisconsin Statutes in providing for surviving spouses in Wisconsin are different from that established in community property states. We also agree that in Wisconsin the method for dealing with inherited property upon divorce is substantially different than the method for dealing with inherited property upon the death of one spouse. However, this court is not convinced that the statutes in question are unreasonable or unconstitutional. There is no requirement that statutes dealing with different aspects of society need to be either consistent or uniform. One of the great strengths of the legislative system is that legislatures are free to experiment with various methods for improving societal organization. In this case, statutes regulating the right of a person to dispose of property as he or she desires need only be reasonable to survive constitutional scru-

[4] In dividing marital property upon divorce, sec. 247.255, Stats. provides:

> Any property inherited by either party prior to or during the course of the marriage shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner.

This, of course, is a fundamentally different method for dealing with inherited property than that promulgated by secs. 861.05 and 861.33, Stats.

tiny under the pursuit of happiness clause of the Wisconsin Constitution. These statutes are reasonable.

In reaching this conclusion, we have neither considered the length of the marriage in this case, nor the desire of Mrs. Eisenberg to dispose of her property as expressed in her will. These factors are superfluous. The statute is broadly written to cover every marital estate, and contains no exceptions. We are not concerned with the length of the marriage or the circumstances surrounding the marriage, but only whether the legislature imposed a reasonable restriction in respect to the remaining spouse's right to an elective share.

The appellant's arguments boil down to a preference on his part for another method of regulating the devolution of property to a surviving spouse rather than the one presently existing in Wisconsin. Failing to convince this court that the present method is either unreasonable or unconstitutional, either in this instance or any hypothetical possibility, the appellant's arguments are now best addressed to the legislature.

EQUAL PROTECTION CLAUSE

The appellant next contends that the statutes violate the equal protection clauses of the fourteenth amendment to the United States Constitution and art. I, §1 of the Wisconsin Constitution. He contends that it is unconstitutional for secs. 861.05 and 861.33, Stats. to apply to only one class of persons, those who are married, and not apply to single persons.

[4]

As we noted previously, Wisconsin is one of the few states which view the right to make a will as being an inherent or sacred right; most jurisdictions view it as being purely statutory. The appellant has been unable to show to this court that in the federal constitu-

tion there exists a right to dispose of property by will. Indeed, the opposite appears to be the case. For instance, in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 48 (1944), the court stated: "Rights to succession by will are created by the state and may be limited, conditioned, or abolished by it." Thus, it seems irrefutable that no federal right to dispose of property by will exists under the federal constitution.

[5, 6]

In Wisconsin the right to dispose of property by will is considered to be an "inherent" or "sacred" right. In considering the constitutionality of legislation which appears to infringe upon a constitutional right, the court in *Redhail v. Zablocki*, 418 F. Supp. 1061, 1069 (E.D. Wis. 1976), *aff'd* 434 U.S. 374 (1978, stated:

> Under the equal protection approach currently utilized by the Court, statutory classifications are generally measured against the rational relationship test and are upheld if they are rationally related to some legitimate governmental interest. [Citations omitted.] If, however, the classification impinges upon fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests.

Thus, under an equal protection challenge based upon the Wisconsin Constitution, we must determine if the classification is necessary to promote compelling government interests, and if it is narrowly drawn to express only such interests.

We hold these statutes meet both tests. They promote compelling government interests, a few of which are the following:

1. They encourage the tranquility and well-being of each spouse in the marital relationship by insuring that one spouse will not be left destitute by the death of the other.

2. They provide for a uniform and objective method for determining that a standard minimum of the property of the deceased spouse is to go to the surviving spouse.

3. They provide a surviving husband with the same elective share rights as a wife.

The protection of a surviving spouse, and the governmental encouragement of the marital relationship, along with the other interests fulfilled by these statutes, are compelling.

[7]

The statutes are narrowly drawn in order to achieve these purposes. Sections 861.05, and 861.33, Stats. only involve a surviving spouse. Whether the state legislature could constitutionally provide similar protection by statute for surviving children is questionable, and a problem we are not called upon to resolve. However, by limiting the elective share statute to a surviving spouse, and by similarly limiting sec. 861.33, Stats. to a surviving spouse, the government drew the statutes with the required specificity. Thus, the difference in classification between married and unmarried people, even under the strict scrutiny test, passes constitutional muster. Of course, since we have found the strict scrutiny test is satisfied, we have implicitly found that the classification is reasonable, and meets all five tests noted in *Dane County v. McManus*, 55 Wis.2d 413, 198 N.W.2d 667 (1972).

DUE PROCESS CLAUSE

[8]

The appellant also contends that federal due process is violated by these statutes. As noted above, however, there is no federal constitutional right to dispose of property by will. The United States Supreme Court has held that a state may regulate the disposition of property as

it best sees fit, *Demorest, supra*. Therefore, appellant's contention that federal due process is somehow violated by secs. 861.05 and 861.33, Stats. is without merit.

RETROACTIVITY

Betty Eisenberg signed her will in 1945; she died in 1977. The present statutes became effective on April 1, 1971, and were applicable to anyone dying after the effective date. It did not affect people who died before April 1, 1971. Appellant contends that the statute is unconstitutional, because it retroactively affects a will made in 1945.

[9]

The simple answer is that the statute is not retroactive. It only involves the disposition of property of people who died after April 1, 1971. Passed in 1969, the law also gave fair warning to the people of this state, since it did not go into effect until April 1, 1971.

[10]

In any case, a will does not create any enforceable right in a beneficiary of that will until the testator has died. The appellant had no rights in this will until Mrs. Eisenberg's death occurred in 1977. Further, there was nothing in the new law which modified in any way Mrs. Eisenberg's right to alter her 1945 will. It is spurious to argue that any change in the probate code could only be effective in a piecemeal fashion, until all people having made wills before the changes went into effect had died.

By the Court.—Order affirmed.

OFFICE OF THE CLERK

SUPREME COURT

STATE OF WISCONSIN

Madison, July 17, 1979

TO: Ray T. McCann
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202

The Court today announced an order in your case as follows:

No. 78-461 In the Matter of the Estate of Betty R. Eisenberg, Deceased: Alvin H. Eisenberg, Co-Personal Representative of the Estate v. Jack M. Eisenberg

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of appellant and considered by the court,

IT IS ORDERED that the petition is denied, with $50.00 costs.

Marilyn L. Graves

Clerk of Supreme Court

OFFICE OF THE CLERK

SUPREME COURT

STATE OF WISCONSIN

Madison, August 27, 1979

To: Ray T. McCann
152 West Wisconsin Ave.
Milwaukee, WI 53203

Quarles & Brady
780 North Water Street
Milwaukee, WI 53202

The Court today announced an order in your case as follows:

#78-461 In the Matter of the Estate of Betty R. Eisenberg, Deceased: Alvin H. Eisenberg, Co-Personal Representative of the Estate v. Jack M. Eisenberg, Surviving Spouse.

MOTION FOR RECONSIDERATION DENIED WITH COSTS.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

IN THE MATTER OF THE ESTATE OF
BETTY R. EISENBERG, DECEASED:

ALVIN H. EISENBERG, CO-PERSONAL
REPRESENTATIVE OF THE ESTATE,

Appellant,

v. CASE NO. 78-461

JACK M. EISENBERG, SURVIVING SPOUSE,

Respondent.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alvin H. Eisenberg, Co-Personal Representative of the Estate, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final Judgment of the Court of Appeals of the State of Wisconsin, affirming the denial of appellant's motion to declare §§861.05 and 861.33, Wis. Stats., unconstitutional, entered in this action on May 31, 1979, and from the Order of the Supreme Court of the State of Wisconsin denying a petition for review, entered in this action on July 17, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated at Milwaukee, Wisconsin, this 26 day of September, 1979

WALTHER & HALLING

by: _____
David L. Walther
Attorneys for
Petitioner

P.O. Address:
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Milwaukee, Wisconsin 53202
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FILED
NOV 9 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-623

IN THE MATTER OF THE ESTATE OF
BETTY R. EISENBERG, DECEASED:

ALVIN H. EISENBERG, CO-PERSONAL
REPRESENTATIVE OF THE ESTATE,

Appellant

v.

JACK M. EISENBERG,
SURVIVING SPOUSE,

Appellee

MOTION TO DISMISS OR AFFIRM

JACKSON M. BRUCE, JR.
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November 8, 1979

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-623

IN THE MATTER OF THE ESTATE OF
BETTY R. EISENBERG, DECEASED:

ALVIN H. EISENBERG, CO-PERSONAL
REPRESENTATIVE OF THE ESTATE,

Appellant

v.

JACK M. EISENBERG,
SURVIVING SPOUSE,

Appellee

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the order of The Wisconsin Supreme Court dated July 17, 1979, denying Appellant's petition for review of the decision of the Wisconsin Court of Appeals, District 1, in *In Matter of Estate of Eisenberg*, 90 Wis.2d 260, 280 N.W. 2d 359 (Wis.App. 1979), on the grounds that no substantial federal question is presented or that the Wisconsin courts below have adequately disposed of the federal questions presented.

INTRODUCTORY STATEMENT

Appellee is co-personal representative of the above-captioned estate, the husband of the decedent, Betty R. Eisenberg, and the father of the Appellant. In this case the Appellant asks the Court to resolve a dispute between father and son regarding entitlement to the assets of the estate of their deceased wife and mother respectively. Although the Appellant has couched his arguments in terms of a federal constitutional challenge to Wisconsin spousal election statutes, the question is without federal significance.

In support of his appeal, Appellant urges this Court to consider two questions:

1. Do Wisconsin Statutes §§861.05(1) and 861.33(1) deprive the decedent, Betty R. Eisenberg of liberty or property without due process of law under the Fourteenth Amendment of the U.S. Constitution?

2. Do said statutes violate the equal protection clause of the Fourteenth Amendment since they apply only to married person?

Appellant's discussion of these straightforward questions is a melange of bits and pieces of unrelated and conflicting federal and Wisconsin constitutional jurisprudence, by means of which he seeks to manufacture a substantial federal question worthy of plenary examination by this Court.[1]

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[1]In reviewing the questions presented by Appellant, certain collateral points may be eliminated:

i. The facts stated at pages 10-11 of Appellant's Jurisdictional Statement are disputed, but are not in any event relevant. *See,* Court of Appeals decision (App. of Appellant p. 8); said decision (App. of Appellant p. 3) sets out the material facts;

(Footnote continued on following page)

THE RIGHT TO MAKE A WILL UNDER WISCONSIN LAW IS NOT "FUNDAMENTAL" FOR PURPOSES OF THE FOURTEENTH AMENDMENT

Wisconsin, unlike the other states, grants protection to the right to make a will under its constitution. However, as Appellant has intentionally failed to point out in his jurisdictional statement, the right to make a will in Wisconsin is, and has always been from the moment of formulation of the rule, *expressly* subject to reasonable legislative regulation, specifically of the type here involved. In *Nunnemacher v. State,* 129 Wis. 190, 108 N.W. 627 (1906), the case generally recognized as first enunciating the constitutional stature of the right to make a will in Wisconsin, the Wisconsin Supreme Court described the right as follows:

> "[The constitutional right to make a will is] *subject to reasonable regulation by the legislature;* lines of descent may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed,

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(Footnote 1 continued)

ii. Wisconsin's present election right is still defined as "dower", Wis. Stats. §861.03 (1977), and the only change of substance made in these laws in the last 100 years was to provide equality of treatment for men and women in 1969. The pre-1969 statutes provide an elective right for women against *both* real and *personal* property, Wis. Stats. §233.14 (1969) and have done so since 1877, long before the articulation of the Wisconsin doctrine of the right to make a will.

iii. Spouses can, and always could, provide for a bar of elective rights by contract, Wis. Stats. §861.07 (1977), and are not limited to the methods described at pages 22-23 of Appellant's Jurisdictional Statement.

iv. Contrary to Appellant's assertion, the operation of the Wisconsin spouse election statutes does not reduce the residuary share by more than one-third.

> and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will, so that dependents may not be entirely cut off. These are all matters within the field of regulation."

The legislature's right to reasonably regulate the right to make a will has been continuously re-affirmed by the Wisconsin Supreme Court. The Wisconsin Supreme Court has never characterized the right to make a will under the Wisconsin Constitution as being absolute in the sense stated in Appellant's Jurisdictional Statement. As recently as 1973, the Wisconsin Supreme Court reaffirmed that reasonable regulation of the right to make a will includes "the right of a widow to renounce the provisions of the will by accepting her statutory rights of dower." *Estate of Schmalz,* 58 Wis. 2d 220, 230, 206 N.W. 2d 141, 146 (1973) quoting from *Estate of Wilkins,* 192 Wis. 111, 113 (1927). Reasonable legislative regulation has *always* been an integral part of the right itself and the Wisconsin Supreme Court has never invalidated a statute as unreasonably regulating the right.

The Appellant's jurisdictional statement ignores this critical aspect of the right to make a will in his attempt to characterize the right as "fundamental" for purposes of his Fourteenth Amendment due process and equal protection challenges to Wisconsin's spousal election statutes. Appellant cites *Board of Regents v. Roth,* 408 U.S. 564 (1972), for the rule that the Fourteenth Amendment protects property rights created by state law, in that instance a university teaching contract. Appellant leaps from that general rule to the unsupported proposition that because Wisconsin regards the right to make a will as "sacred and fundamental" for purposes of *its* constitution, that characterization automatically carries over and is binding upon this Court in the context of a federal constitutional challenge. This is not and cannot be the case. *See San Antonio School District v. Rodriquez,* 411 U.S. 1, 31 (1973).

The question of the "fundamental" stature of Wisconsin's right to make a will under the Fourteenth Amendment must be resolved in terms of federal constitutional law, and this Court has held that the right to make a will is not guaranteed by the United States Constitution. *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36 (1944). The Wisconsin Court of Appeals expressly recognized this basic difference in approach when it considered the merits of Appellant's federal constitutional arguments. *In Matter of Estate of Eisenberg, supra* at 627-28, 629-630. If the Wisconsin legislature abolished the right to make a will tomorrow, its actions would not run afoul of any provision of the United States Constitution. This Court has consistently held that a state legislature may, without violating the federal constitution, completely abolish the right to make a will. The Wisconsin legislature's action in abolishing the right to make a will would run afoul of the Wisconsin constitution, but that is a matter of Wisconsin, not federal, law.

Appellant argues, however, that because Wisconsin grants protection to the right to make a will under its constitution rather than by statute, the present case is distinguishable from *Demorest.* This distinction, however, is not one of substance. The mere fact that a state-created right stems from the state constitution rather than state statutory or common law has no bearing on its status under the United States Constitution. For Fourteenth Amendment purposes, federal judicial analysis of the validity of the Wisconsin spousal election statutes, specifically found by the Wisconsin courts below to be valid limitations on the right to make a will under Wisconsin law, is no different from the analysis that would be applied to a challenge to the spousal election statutes of a sister state that granted its citizens the right to make a will by statute rather than constitution. To hold otherwise would allow one state to gain advantage over other states by virtue of *ex parte* action.

This basic difference in approach and scope between the Wisconsin and United States Constitutions has been recognized before. For example, in *San Antonio School Board v. Rodriquez, supra,* this Court expressly refused to characterize the right to education as "fundamental" for purposes of the equal

protection clause of the Fourteenth Amendment. Three years later, however, in *Buse v. Smith,* 74 Wis.2d 550, 247 N.W.2d 141 (1976), the Wisconsin Supreme Court held that the right to education is a fundamental right guaranteed by the Wisconsin Constitution and subjected a Wisconsin statute adversely affecting that right to strict judicial scrutiny. The Wisconsin position is directly opposite to that of this Court in *Rodriquez* and was expressly recognized as such by the Wisconsin Supreme Court. *Buse, supra* at 564.

When Wisconsin's right to make a will is placed in its proper federal constitutional perspective, the lynch pin of Appellant's challenge to Wisconsin's spousal election statutes under the due process and equal protection clauses of the Fourteenth Amendment disappears.[2]

THE CHALLENGED STATUTES DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution prevents a state from depriving its citizens of property or liberty without due process of law. The Wisconsin spousal election statutes did not deprive the decedent, Betty R. Eisenberg, of either a property or a liberty interest. Under a line of Wisconsin cases starting with *Nunnemacher v. State, supra,* Betty R. Eisenberg's right was only to make a will *subject to reasonable legislative regulation,* no more, no less. Her right was always limited by the Wisconsin legislature's corresponding right to reasonably regulate it. The legislature, in enacting the challenged statutes, properly exercised this right. Each Wisconsin court that has considered this case has determined, as a matter of Wisconsin law, that the legislature acted reasonably and within the scope of its power in adopting these statutes. Consequently, Betty R. Eisenberg was deprived of nothing whatsoever by the enactment of §§861.05(1) and 861.33(1).

[2]In fact, most of Appellant's substantive arguments are devoted to his objections to the reasoning of the Wisconsin Court of Appeals' in support of its holding that the challenged statutes do not violate the *Wisconsin* constitution. This reasoning, however, relates only to Wisconsin law and has no direct bearing on Appellant's Fourteenth Amendment arguments.

THE CHALLENGED STATUTES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant argues that because the challenged statutes apply only to married persons, they violate the equal protection clause of the Fourteenth Amendment and must be subjected to strict judicial scrutiny. This Court has consistently held, however, that:

> "Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class."

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The strict scrutiny doctrine is a judicially created test developed long after Wisconsin characterized its limited right to make a will, subject to reasonable legislative regulation, as "fundamental". That Wisconsin's right to make a will subject to reasonable legislative regulation is not "fundamental" in the federal sense is clear from even a cursory comparison to the rights which this Court has so characterized. Instead the right to make a will under the state law (whether created by the constitution, the statutes or the case law of a particular state) is an economic right of the sort traditionally accorded rational basis treatment by this Court.

The Wisconsin Court of Appeals applied a strict scrutiny test in analysing the validity of the Wisconsin statutes under the Wisconsin constitution. They did so because the right in question is declared by Wisconsin case law to be "sacred and fundamental". As discussed above, such determination does not control the applicable test for federal purposes. The determination of the degree of protection and the level of judicial scrutiny to be applied is a federal one. To hold otherwise would subvert

the federal constitution by allowing each state to declare which of its created rights were fundamental, and therefore entitled to the highest degree of federal protection usually reserved for the political and private personal rights guaranteed by the First Amendment.[3] In *Demorest* this Court implicitly held that the right to make a will is not an inherent, fundamental, human right. It is simply an economic privilege, a state-created incident of property ownership, which state legislatures are free to abolish or restrict as they deem appropriate.

Similarly, the challenged statutes do not operate to the disadvantage to a suspect class of persons. This Court has never held that a classification based on marital status is "suspect." *Eisenstadt v. Baird,* 405, U.S. 438 (1972) involved a federal constitutional challenge to a statute limiting the availability of contraceptives to married persons. The statute was subjected to close scrutiny because it infringed upon fundamental, human rights regarding procreation and sexual activity, not because marital status was "suspect."

A suspect class is one "saddled with such disabilities or subjected to such a history of purposefully unequal treatment, or relegated to such position of political powerlessness as to warrant extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriquez, supra.* Countless statutes and laws, state and federal, of every sort and description make distinctions between the married and the unmarried but married persons have never been the subject of invideous discrimination in this country. Marriage is a voluntary status unlike race, creed, color, sex or national origin and

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[3]The corrollary to Appellant's contention demonstrates its absurdity: If a state characterized a right as non-fundamental under *its* constitution, then such characterization would automatically determine the federal test to be applied. Thus, the right to personal freedom regarding procreation might be characterized by State X as "non-fundamental" and therefore any statutory restriction of that right would not be subject to federal strict scrutiny. Similarly, State Y might elevate the issuance of a hunting license to a "fundamental" right thereby forcing federal courts to invalidate all restrictions on such right that were not narrowly drawn to promote only compelling state interests.

the married are certainly not an unrepresented minority. In fact, married individuals make up 68% of the persons entitled to vote in this country. *United States Bureau of the Census, Statistical Abstract of the United States: 1978* at 40. To assert that married citizens of Wisconsin do not have the political power to control the type of regulations that affect their testamentary rights, is absurd.

Since the challenged statutes do not affect a fundamental right or operate to the detriment of a suspect class, the proper test to be applied in considering a challenge to the statutes under the equal protection clause of the Fourteenth Amendment is the rationale basis test. The rationale basis test was described by this Court in *Massachusetts Board of Retirement v. Murgia, supra* at 314 as:

> "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."

Similarly in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) the Court stated:

> "A statutory classification impinging on no fundamental interests, and especially one dealing only with economic matters, need not be drawn so as to fit with precision the legitimate purposes animating it. . . . That [a state] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional."

The analysis of the Wisconsin Court of Appeals in its opinion below, clearly demonstrates that the challenged statutes meet the rationale basis test, and in fact, for purposes of the

Wisconsin Constitution meet the more stringent strict scrutiny test.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that the Court dismiss this appeal or, in the alternative, affirm the order of the Wisconsin Supreme Court dated July 17, 1979.

Respectfully submitted,

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